Supreme Court, U.S.
FILED
MAR 2 1995
CLERK

(2)

No. 94-1187

In The

# Supreme Court of the United States

October Term, 1994

JOHN PHILLIP SMITH, M.D.,

*Petitioner,*

v.

WILLIAM B. RICKS, M.D., et al.,

*Respondents.*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

## BRIEF AMICUS CURIAE OF THE SEMMELWEIS SOCIETY IN SUPPORT OF PETITIONER

STANLEY FLEISHMAN
*Counsel of Record*
PAULINE MARTIN ROSEN
BARRY A. FISHER
FLEISHMAN FISHER & MOEST
2049 Century Park East,
Suite 3160
Los Angeles, California 90067
(310) 557-1077

*Counsel for Amicus*
*The Semmelweis Society*

March 2, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22 pp

## QUESTION PRESENTED

Whether the court below violated the plain terms of 42 U.S.C. § 11111(b)(3)(C)(i) which states:

> in the hearing the physician involved has the right to representation by an attorney or other person of the physician's choice

where the court below granted immunity to a peer review entity that refused to permit Petitioner's lawyer to speak or play an effective role in the peer review hearing.

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

INTEREST OF AMICUS ..... 1

SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 5

FOR IMMUNITY TO ATTACH UNDER THE HCQIA, THE PEER REVIEW HEARING MUST BE FAIR AND ADEQUATE: IT MUST AFFORD THE PHYSICIAN "THE RIGHT TO [EFFECTIVE] REPRESENTATION BY AN ATTORNEY ..... 5

A. *The Statute Plainly Requires And Petitioner Was Denied The Right To Effective Representation By An Attorney* ..... 7

B. *Only Hearings Complying Verbatim With § 11112(b)(3)(C) Are Entitled To A Presumption Of Adequacy Under The Act; Respondent's Hearing Which Failed To Provide Representation By An Attorney Was Erroneously Afforded This Presumption By The Court Below* ..... 8

C. *Respondents Did Not Comply With The HCQIA's Requirements For Immunity And Are, Therefore, Not Entitled To Immunity Under The Act* ..... 15

CONCLUSION ..... 15

# TABLE OF AUTHORITIES

Page

CASES

*Austin v. MacNamara*, 979 F.2d 728 (9th Cir. 1992) ..... 2

*Bixby v. Pierno*, 4 Cal. 3d 130 (1971)..... 11

*Boczar v. Manatee Hospital*, 993 F.2d 1514 (11th Cir. 1994)..... 1

*Bolt v. Halifax Hospital*, 891 F.2d 810 (11th Cir.), *cert. denied*, 495 U.S. 924 (1990) ..... 2

*Connecticut National Bank v. Germain*, 503 U.S. ___, 112 S. Ct. 1146 (1992) ..... 13

*Gideon v. Wainwright*, 372 U.S. 342 (1963)..... 4

*Goldsmith v. Harding Hospital, Inc.*, 762 F. Supp. 187 (S.D. Ohio 1991)..... 15

*Hancock v. Blue Cross-Blue Shield*, 21 F.3d 373 (10th Cir. 1994) ..... 15

*Meyer v. Nebraska*, 262 U.S. 390 (1923)..... 5

*Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)..... 6

*Patrick v. Burget*, 486 U.S. 102 (1988) .....1, 2

*Powell v. Alabama*, 287 U.S. 45 (1932)..... 4

*Purdy & Fitzpatrick v. California*, 71 Cal. 2d 566 (1969) .....5, 6

*Summit Health Ltd. v. Pinhas*, 111 S. Ct. 1842 (1991) ...1, 2

*Truax v. Raich*, 239 U.S. 33 (1915) ..... 5

TABLE OF AUTHORITIES – Continued

Page

STATUTES

The Health Care Quality Improvement Act (HCQIA), 42 U.S.C., §§ 11101 - 11152 (1986) .. *passim*

LEGISLATIVE MATERIALS

H. Rep. No. 903, 99th Cong., 2d Sess. 11 (1986) *reprinted in* 1986 U.S.C.C.A.N. 6384 ..... 11, 13, 14

OTHER AUTHORITIES

American Bar Association, Section of Antitrust Law, PRACTICAL IMPLICATIONS OF THE HEALTH CARE QUALITY IMPROVEMENT ACT, ANTITRUST ANALYSIS 48 (1994) ..... 16

Pauline Martin Rosen, *Medical Staff Peer Review: Qualifying the Qualified Immunity Provision*, 27 LOY. OF L.A. L.R. 357 (1993)..... 2

Susan L. Horner, *The Health Care Quality Improvement Act of 1986: It's History, Provisions, Applications, and Implications*, 16 AM. J. L. & MED. 455, 470 (1990) ..... 13

Thaddeus J. Nodzenski, *Where Is The Quality In The Health Care Quality Improvement Act of 1986?*, 22 LOY. U. CHI. L.R. 361 (1991)..... 2

WILLIAM SHAKESPEARE, OTHELLO ..... 6

## INTEREST OF AMICUS

The Semmelweis Society[1] takes its name from the 19th century Hungarian physician, Ignaz Semmelweis, who was vilified by his colleagues and superiors in the medical profession because of his strongly-held belief that physicians should wash their hands and use clean instruments before delivering babies and performing surgery. His life ended in disgrace for advocating views which ultimately led to the breakthroughs of Lister and Pasteur.

Semmelweis is remembered in history as the classic victim of abuse of power by fellow professionals to the detriment of society. Despite the fact that Semmelweis' mortality rate was lower than his peers', he was the doctor scrutinized. The Semmelweis Society is dedicated to seeing that the peer review process in the United States is not used to drive good doctors – often the efficient, innovative and economical – from the profession by cutting off their hospital privileges for reasons having nothing to do with the improvement of the quality of medical care. The non-profit Society, incorporated under the laws of California, is comprised of members who have been aggrieved by bad faith peer review. In fact, some members – targeted by improperly motivated peer review – have successfully visited this Court in the past, *Summit Health Ltd. v. Pinhas*, 111 S. Ct. 1842 (1991) and *Patrick v. Burget*, 486 U.S. 102 (1988). Other members and supporters have pressed similar claims in lower courts, *Boczar v.*

---

[1] The Society sought and was given permission of the Petitioner and Respondent to file this brief. Their letters are on file with the Court.

*Manatee Hospital*, 993 F.2d 1514 (11th Cir. 1994); *Bolt v. Halifax Hospital*, 891 F.2d 810 (11th Cir.), *cert. denied*, 495 U.S. 924 (1990); *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992).

The Health Care Quality Improvement Act (HCQIA), 42 U.S.C. §§ 11101-11152, grew out of the *Patrick* case,[2] and provides immunity for properly conducted peer review activities. It specifically states that a physician under review is entitled to representation by an attorney.

The HCQIA imposes its due process criteria to ensure that peer review actions are taken in the furtherance of quality of care and not as a pretense for anticompetitiveness or health care entity politics.[3] These requirements safeguard a doctor's right to work at his profession by ensuring a physician is not excluded from health care entities due to arbitrary, capricious or anticompetitive reasons.

In the case at bar, Petitioner had a lawyer present at the hearing but he was prohibited from speaking and actively representing the Petitioner. Amicus contends that when Congress provided that a physician under review

---

[2] Thaddeus J. Nodzenski, *Where Is The Quality In The Health Care Quality Improvement Act of 1986?*, 22 Loy. U. Chi. L.R. 361, 361 (1991) ("Largely in response to the jury's verdict in *Patrick*, Congress passed the Health Care Quality Improvement Act.").

[3] *See, e.g., Patrick v. Burget*, 486 U.S. 102 (1988); *Summit Health, Ltd. v. Pinhas*, 111 S. Ct. 1842 (1991); *See, also*, Pauline Martin Rosen, *Medical Staff Peer Review: Qualifying the Qualified Immunity Provision*, 27 Loy. of L.A. L.R. 357 (1993) (detailing legislative history and case law demonstrating abuse of peer review function).

has "the right to be represented by an attorney" it meant that the lawyer must be permitted to act as a lawyer.

The court below erroneously granted immunity notwithstanding the fact that Petitioner was denied the right to have counsel of his choice speak and participate at a peer review hearing conducted by Respondents. The court below held that the failure to afford Petitioner the right to an attorney as provided in the HCQIA was "close" to what the statute requires. This the HCQIA does not permit.

## SUMMARY OF ARGUMENT

Petitioner was subjected to a peer review hearing conducted under the auspices of the Respondent Hospital. During the hearing Petitioner wanted an attorney to speak for him but Petitioner was effectively denied this right.

The HCQIA defines procedures that will be deemed adequate to meet the due process prong of the statutory immunity requirements. It provides:

> (C) in the hearing the physician involved has the right to
>
> (i) representation by an attorney or other person of the physician's choice,
>
> (ii) have a record made of the proceedings . . .
>
> (iii) to call, examine, and cross-examine witnesses,
>
> (iv) to present evidence . . . , and

> (v) to submit a written statement at the close of the hearing. . . .

42 U.S.C. § 11112(b)(3)(C)(i)-(v).

The right to representation by an attorney is paramount because it is an attorney who can effectively ensure at each step – e.g., notice and hearing – that the physician receives the process due him. It is an attorney who can present the facts, supported by the testimonial and documentary evidence, to assure a fair hearing and a fair record – the essence of due process. As the Court stated more than 30 years ago:

> The right to be heard would be, in many cases, of little avail if it did not comprehend *the right to be heard by counsel*. Even the intelligent and educated layman . . . lacks both skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

*Gideon v. Wainwright*, 372 U.S. 342, 344-45 (1963) quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (emphasis added).

Congress wrote – plainly and unequivocally – a physician has "the right to representation by an attorney . . . of [his] choice." 42 U.S.C. § 11112(b)(3)(C)(i). Respondents denied Petitioner this right and they, therefore, are not entitled to immunity.

## ARGUMENT

### FOR IMMUNITY TO ATTACH UNDER THE HCQIA, THE PEER REVIEW HEARING MUST BE FAIR AND ADEQUATE: IT MUST AFFORD THE PHYSICIAN "THE RIGHT TO [EFFECTIVE] REPRESENTATION BY AN ATTORNEY."

For more than three quarters of a century, the "right to work for a living in the common occupations of the community" has enjoyed substantive as well as procedural due process protections. *Truax v. Raich*, 239 U.S. 33, 41 (1915). In the leading case of *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court held that the right to work at one's trade or profession is of the very essence of the personal freedoms that was the purpose of the Due Process and Equal Protection provisions to secure. *Id.* at 144 n.12. In *Meyer*, the Court stated that while it had not attempted to define with exactness the liberty guaranteed by the Due Process Clause, it had no doubt that the right to engage in one's occupation is "one of several fundamental liberties," like the right of the individual to "acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long ago recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 626.

The California Supreme Court in *Purdy & Fitzpatrick v. California*, 71 Cal. 2d 566 (1969), building on this case, explained that "[a]ny limitation on the opportunity of employment impedes the achievement of economic security, which is essential for the pursuit of life, liberty and

happiness; courts sustain such limitations only after careful scrutiny." *Id.* at 579. The court added that "employment in a *particular* occupation was a significant, if not fundamental, interest entitled to special protection." *Id.* at 584-585 & n.46. It is this right that is at stake here. The HCQIA bestows total immunity for properly conducted peer review proceedings, even if they are maliciously initiated and even if they erroneously ruin a physician's reputation.

Only within the context of a properly conducted peer review hearing does a doctor have a chance to vindicate his good name. Once immunity attaches, a physician has no remedy for the harm caused him by defamatory and untrue statements made under the guise of peer review. For as this Court has recognized:

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse steals trash;
> 'Tis something, nothing;
> Twas mine, 'tis his, and has been salve to
> thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.

*Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990) *quoting* WILLIAM SHAKESPEARE, OTHELLO, Act III, scene 3.

The repercussions from peer review actions reverberate forever through a physician's professional career. The HCQIA creates reporting requirements to a National Data Bank. All actions that deny, restrict or revoke privileges for quality of care reasons must be reported. A doctor's peer review record must be checked by all health

care entities prior to granting privileges. 42 U.S.C. §§ 11131-11135. A doctor's livelihood, therefore, is on the line at all peer review proceedings. It is this fundamental right – the right of a physician to continue in his chosen profession – that is implemented in this case. The hearing, if properly conducted, affords the doctor under review his only day in court. It must be a fair day.

### A. The Statute Plainly Requires And Petitioner Was Denied The Right To Effective Representation By An Attorney.

The court below recognized that the statute required representation by an attorney, *Pet.* 15a, but nevertheless held that an attorney "present" at the hearing but forbidden to speak or participate was either an exact "fit" or "so close" to the statute that this requirement had been satisfied. *Pet.* 16a.

Section 11112(b)(3)(C) lists those hearing aspects considered so intrinsic to fairness that adhering to them creates a presumption of fairness under the Act. At the top of the list for "in the hearing," the Act provides the right to "representation by an attorney." This placement is no accident – for this is the most important and protective of all procedures. It provides the doctor with a trained advocate who recognizes and appreciates the high stakes at risk in the proceedings and champions the doctor's cause. It is an attorney who can ensure that the other elements required for fair procedures are complied with – that a record is made as provided for in 42 U.S.C. § 11112(b)(3)(C)(ii); that witnesses are called, examined, and cross-examined as provided for in 42 U.S.C.

§ 11112(b)(3)(C)(iii); and that relevant evidence is presented as provided for in 42 U.S.C. § 11112(b)(3)(C)(iv). In short, the right to representation by an attorney is essential to HCQIA fairness.

Petitioner's attorney was "present" but he was a mere on-looker, who was not allowed to function as an advocate in the proceedings – he could not make comments on the record, he could not examine and cross-examine witnesses. *Pet.* 7a, 15a, 16a & n.8. The court below – by equating mere presence with representation – in effect authorized pseudo-lawyering. No one would doubt, for example, that an operation performed with a surgeon merely whispering instructions to a lay person is not "close" to having an operation by a surgeon. Similarly, here, the presence of Petitioner's attorney at the hearing is not close to Petitioner having an attorney of his choice represent him.

### B. Only Hearings Complying Verbatim With § 11112(b)(3)(C) Are Entitled To A Presumption Of Adequacy Under The Act; Respondent's Hearing Which Failed To Provide Representation By An Attorney Was Erroneously Afforded This Presumption By The Court Below.

The Act provides three sets of interdependent criteria which a peer review entity must meet for qualified immunity – the criteria as provided in sections (a), (b), and (c) of § 11112. Section 11112(a), provides the general criteria that must be met,

(a) In general

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken –

(1) in the reasonable belief that the action was in the furtherance of quality of care,

(2) after a reasonable effort to obtain the facts in the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain the facts and after meeting the requirement of paragraph (3).

This section establishes its own interdependency scheme – for in paragraph (4) it reiterates that the reasonable effort required in paragraph (2) must be met as well as the notice and hearing requirements of paragraph (3) to reach the reasonable belief requirement of (4). For paragraph (4) requires that the disciplinary action be warranted after a full investigation and hearing. Each element of section (a) is a hurdle the peer review entity must abide by, with (4) incorporating each element that precedes it.

Next, section 11112(b) details the notice and hearing aspects that will be presumed to meet the criteria of section 11112(a)(3) – and as such provides the measuring stick for all peer review hearing issues. Section 11112(b)(3) provides in relevant part:

(C) in the hearing the physician has the right –

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witnesses,

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing

Meeting the criteria of § 11112(b) creates a presumption that the peer review body has complied with the requirement of § 11112(a)(3) and the failure to meet the specific criteria provided, "in and of itself" does not indicate per se that the proceedings were not fair. 42 U.S.C. § 11112(b)(3). Conversely, failure to meet the criteria must, *per se*, indicate that the proceedings require scrutiny to determine whether or not they are fair. The court below failed to consider the plain meaning of this particular phrase of the statute and thus failed to apply it to the facts of Petitioner's case.

At this juncture – with the specific criteria of (C) not met – a court must evaluate the significance of each element not complied with – and determine the impact of that particular denial of due process on the fairness quotient of the entire proceedings. This interpretation of the

application of the presumption of adequacy is supported by the legislative history which states:

> The Committee is aware, for example, that some courts have already carefully spelled out different requirements for certain professional review activities or actions, such as procedures for decisions regarding applicants for clinical privileges at a hospital. In those situations, compliance with applicable law should satisfy the "adequacy" requirement even where such activities or actions require different or fewer due process rights than the ones specified in . . . In any case, it is the Committee's intent that physicians receive fair and unbiased review to protect their reputations and medical practices.

H. Rep. No. 903, 99th Cong., 2d Sess. 10-11 (1986) *reprinted in* 1986 U.S.C.C.A.N. 6384, 6393.[4]

Rephrased, it was the intent of the legislature that if the due process procedures provided did not match the provisions detailed in § 11112(b), then they must match existing case law. In other words, prevailing law must

---

[4] The California Supreme Court in *Bixby v. Pierno*, 4 Cal. 3d 130 (1971), drew a sharp distinction between those applying for a license and those holding a license to practice their profession, stating that the former do not, while the later do, have a vested fundamental right. *Id.* at 144. The court explained that in cases involving applications, the courts have largely deferred to the administrative expertise of the agency, but "once the agency has initially exercised its expertise and determined that the individual fulfills the requirements to practice his profession, the right is vested and fundamental." *Id.* at 146. Petitioner had been granted staff privileges at Respondent's hospital. The peer review of the case at bar concerned the renewal of such privileges.

have reviewed identical procedural processes and found them to have been fair and unbiased. In the case at bar, the court chastised Petitioner for putting forth the proposition that state case law or industry guidelines would be relevant in evaluating whether or not the procedures provided him were fair. *Pet.* 16a n.8. The court commented that Petitioner wanted the peer review proceedings to "look like regular trials in a court of law." *Id.* Amicus' reading of the HCQIA, which details specifically in § 11112(b)(C) such proceedings, is that the HCQIA intended particular safeguards. One such specific – and, yes, trial like protection – is representation by a speaking, participating attorney. For physicians, particularly in light of the immunity provided by the HCQIA, the hearing is a doctor's only setting to ensure his right to practice medicine is properly protected.

To complete the interdependency scheme of the statute, section 11111(c) provides exceptions – none of which are applicable to this case – to the stringent due process requirements of section (b). Section (c) details three situations:

> (A) where there is no adverse professional review action taken, or
>
> (B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or
>
> (2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action

> may result in an imminent danger to the health of any individual.

where the reviewing body is not required to comply with § 11112(b). Section (c) specifically deals with egregious and emergency situations requiring swift action by the health care entity in the interest of patient safety which amicus contends represents the "other procedures as are fair to the physician under the circumstances" provided for in § 11112(a)(3). This reading of section (c) is supported by the legislative history which states:

> Subsection (c) modifies the due process required to obtain immunity under section 101(c) during investigations or in health emergencies. Under this priority, there is no requirement that due process meet a test of adequacy . . .

H. Rep. No. 903, 99th Cong., 2d Sess. 11 (1986) *reprinted in* 1986 U.S.C.C.A.N. 6384, 6394. *See also,* Susan L. Horner, *The Health Care Quality Improvement Act of 1986: It's History, Provisions, Applications, and Implications,* 16 Am. J. L. & Med. 455, 470 (1990).

The court below failed to appreciate the interdependency created by the statute and controlling for evaluating statutory immunity. It short-circuited the statutory scheme at section 11112(a) and uniformly applied a presumption in favor of the peer review entity. The plain language of the statute imparts specific due process protections indicative of fairness that carry their own presumption of adequacy. This Court has uniformly insisted on the plain reading of a statute. *Connecticut National Bank v. Germain,* 503 U.S. ___, 112 S. Ct. 1146, 1149 (1992)

("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

The court below ignored the manner in which § 11112(b) and (c) were specifically designed to define the requirements of § 11112(a)(3). The presumption in favor of a peer review entity provided in § 11112(a) is qualified by the "deemed to have met" criteria detailed in (b). In fact, the legislative history indicates that the presumption in favor of the peer review entity is limited to 42 U.S.C. § 11112(a)(1) –

> The presumption applies only to the reasonable belief standard, not to the other standards. Those additional standards require a group engaged in peer review to make a reasonable effort to obtain the facts, *to provide adequate due process*, and to have a reasonable belief that the professional review action was warranted by the facts known.

H. Rep. No. 903, 99th Cong., 2d Sess. 10 (1978) *reprinted in* 1986 U.S.C.C.A.N. 6384, 6393 (emphasis added).

The court below, however, erroneously applied the presumption of adequacy to procedures that did not meet the "deemed adequate" criteria, *Pet.* 16a, and concluded that "no reasonable jury could find Dr. Smith rebutted the presumption that the procedures were adequate." *Id.* Amicus contends that reasonable jurors could conclude that allowing an attorney to be present – but not to perform lawyering functions – is not the same as the statute's requirement for "representation by an attorney."

Reasonable jurors could make this distinction and determine that the hearing was not adequate and did not qualify for immunity.[5]

### C. Respondents Did Not Comply With The HCQIA's Requirements For Immunity And Are, Therefore, Not Entitled To Immunity Under The Act.

Case law has established that a physician not provided with the fair notice and hearing procedures of the Act does *not* have a private cause of action against the health care entity. But failure to comply with the Act does deny immunity to the peer review entity. *Hancock v. Blue Cross-Blue Shield*, 21 F.3d 373 (10th Cir. 1994); *Goldsmith v. Harding Hospital, Inc.*, 762 F. Supp. 187 (S.D. Ohio 1991). Accordingly, the court below should have denied immunity to Respondents because they did not allow Petitioner to be represented by an attorney in accordance with the HCQIA.

## CONCLUSION

The courts must not make it easy for peer review committees and procedures to circumvent a doctor's right to protect his right to practice and his professional reputation. The most certain way to ensure that doctors are

[5] Petitioner lists in his Petition, Appendix F, other discrepancies that reasonable jurors might recognize as unfair. A review of these allegations is outside the scope of this amicus brief.

not improperly sanctioned is to provide due process safeguards for the doctor, this is what the HCQIA does. An indispensable safeguard is the right to representation by an attorney.

The Court should grant the petition for writ of certiorari to review the important question of whether a peer review entity that denies a physician the right to effective representation by an attorney of his choice is nevertheless entitled to immunity under the HCQIA. Unless the petition is granted, the erroneous decision of the court below will be used to deprive physicians nationwide of effective representation by an attorney.[6]

The Semmelweis Society respectfully asks this Court to restore honor to physician discipline proceedings by reviewing and overturning the decision of the court below.

---

[6] *See, e.g.*, American Bar Association, Section of Antitrust Law, PRACTICAL IMPLICATIONS OF THE HEALTH CARE QUALITY IMPROVEMENT ACT, ANTITRUST ANALYSIS 48 (1994):

> The only case that has addressed this issue [representation by an attorney] is *Smith v. Ricks* [798 F. Supp. 605 (N.D. Cal. 1992)], where the court implicitly held that the failure to allow plaintiff's counsel to cross-examine witnesses did not render the proceedings unfair to the physician when the physician was allowed to call, examine, and cross-examine witnesses.

The Petition for Certiorari should be granted.

Dated: March 2, 1995

Respectfully Submitted,

STANLEY FLEISHMAN
*Counsel of Record*
PAULINE MARTIN ROSEN
BARRY A. FISHER
FLEISHMAN FISHER & MOEST
2049 Century Park East, Suite 3160
Los Angeles, California 90067
(310) 557-1077

*Counsel for Amicus*
*The Semmelweis Society*